United Nations ECE/MP.PP/WG.1/2018/3

Economic and Social Council

Distr.: General
18 May 2018

Original: English

Economic Commission for Europe

Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Working Group of the Parties

Twenty-second meeting
Geneva, 19–21 June 2018
Item 3 (c) of the provisional agenda
Substantive issues: access to justice

Report of the Task Force on Access to Justice on its eleventh meeting*

Summary

At its second session (Almaty, Kazakhstan, 25–27 May 2005), by its decision II/2, the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters established the Task Force on Access to Justice to undertake a number of tasks related to promoting access to justice in environmental matters, including analytical work on the financial and other barriers to access and the sharing of relevant experience and examples of good practice (ECE/MP.PP/2005/2/Add.3, paras. 30–33). By that same decision, the Task Force was requested to present the results of its work to the Working Group of the Parties for consideration and appropriate action. At its sixth session (Budva, Montenegro, 11–13 September 2017), the Meeting of the Parties renewed the mandate of the Task Force to carry out further work under the authority of the Working Group of the Parties (see ECE/MP.PP/2017/2/Add.1, decision VI/3).

Pursuant to the above mandates, the present report of the Task Force on its eleventh meeting (Geneva, 27–28 February 2018) is being submitted for the consideration of the Working Group of the Parties at its twenty-second meeting.

* The present document was submitted late owing to the additional time required to liaise with speakers on their presentations and interventions and for the finalization of the report.

GE.18-08086(E)

1808086

Please recycle

Contents

		Page
	Introduction	3
I.	Opening of the meeting and adoption of the agenda	3
II.	Thematic focus: access to justice in cases on the right to environmental information	3
III.	Stocktaking of recent and upcoming developments	9
IV.	Tools to promote effective access to justice	14
V.	Prioritization of the work for the intersessional period 2018–2021	18
VI.	Approval of key outcomes and closing of the meeting	19

Introduction

1. The eleventh meeting of the Task Force on Access to Justice under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) was held on 27 and 28 February 2018 in Geneva, Switzerland.

2. The meeting was attended by experts designated by the Governments of Armenia, Belarus, Bosnia and Herzegovina, Croatia, Denmark, Estonia, Georgia, Germany, Ireland, Italy, Kazakhstan, Latvia, Malta, Montenegro, the Netherlands, the Republic of Moldova, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland and the United Kingdom of Great Britain and Northern Ireland. A representative of the European Commission was present on behalf of the European Union. Representatives of the European Ombudsman and the European Investment Bank were also present.

3. Delegates from Guinea-Bissau attended the meeting.

4. Also attending the meeting were judges and representatives of judicial institutions and independent review bodies from Albania, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Czechia, Finland, Georgia, Italy, Ireland, Kazakhstan, Kyrgyzstan, Latvia, Montenegro, Norway (by video link), Poland, the Republic of Moldova, Serbia, Slovakia, and Tajikistan. Some of these participants also represented the European Union Forum of Judges for the Environment.

5. Representatives of the Office of the United Nations High Commissioner for Human Rights, the United Nations Environment Programme (UNEP) and the Regional Environmental Centre for Central and Eastern Europe were also present.

6. Representatives of Aarhus centres, international financial institutions and business, professional, research and academic organizations were also present, as were representatives of international, regional and local non-governmental organizations (NGOs), many of whom coordinated their input within the framework of the European ECO Forum.

I. Opening of the meeting and adoption of the agenda

7. The Task Force Chair, Mr. Jan Darpö (Sweden), opened the meeting.

8. The Task Force adopted its agenda as set out in informal document AC/TF.AJ-11/Inf.1.[1]

II. Thematic focus: access to justice in cases on the right to environmental information

9. In a thematic session on access to justice in cases on the right to environmental information, participants discussed good practices, innovative approaches, priority actions and needs to further promote the implementation of article 9, paragraph 1, in conjunction

[1] Documents for the meeting were produced informally and are thus not available on the Official Document System of the United Nations. All documents for the eleventh meeting, including background documents, a list of participants, statements and presentations, are available online from http://www.unece.org/env/pp/aarhus/tfaj11.html .

with article 9, paragraphs 4 and 5, article 4, paragraph 7, and other relevant provisions of the Convention. The discussion aimed to contribute to the achievement of Sustainable Development Goal targets 16.3[2] and 16.10.[3]and other relevant Sustainable Development Goals and targets.

10. The Chair opened the discussion by drawing attention to two background documents: an overview of the implementation of article 9, paragraph 1, of the Convention (AC/TF.AJ-11/Inf.2) prepared on the basis of the 2017 national implementation reports; and a table listing selected opinions, findings and recommendations of a systemic nature adopted by the Compliance Committee with regard to the implementation of article 9, paragraph 1, and other relevant provisions of the Convention (AC/TF.AJ-11/Inf.3). He also drew attention to the draft questionnaire (AC/TF.AJ-11/Inf.4) prepared to address the gaps identified and to collect additional information on access to justice.

11. The Chair noted that members of the public in a majority of Parties could challenge a refusal of their information requests before several bodies, including a court of law, an ombudsman or information commissioner, and invited participants to share their perspectives and experiences in that regard.

12. A representative of the European Ombudsman underscored that it was important for public authorities to uphold transparency and disseminate environmental information proactively or promptly disclose it upon request as a pillar of good administration. Recourse to justice as a mean to access such information should be considered as a last resort in cases of wrongful refusals. Several measures could promote barrier-free access to justice for the public in such cases. In particular, a refusal should include comprehensive information on the available judicial and non-judicial remedies. The availability of internal hierarchical remedies could facilitate full and speedy review at an early stage. External remedies should be easily accessible and effective and include alternatives to lengthy and costly judicial review. In that regard, the complaint procedure before the European Ombudsman had rather liberal admissibility criteria, was free of charge and fast. In 2017, the Ombudsman had launched a specific fast-track procedure for cases concerning administrative transparency (access to documents) to be opened within five working days and decided within 40 days of receipt of the complaint with a possibility to issue a recommendation to grant full or partial access to information immediately. As the decisions of the European Ombudsman were not legally binding, the successful outcome of the Ombudsman's inquiries depended on the cooperation of the institutions concerned.

13. A representative of the Commissioner for Environmental Information in Ireland said that the Commissioner's office had been established as a legally separate and independent body in May 2007 to review decisions of public authorities refusing access to environmental information. In accordance with the national framework, a person who had not been satisfied with an initial decision could request an internal review of the decision within one month, and if dissatisfied appeal it to the Commissioner for Environmental Information at a small fee and then appeal to the High Court on a point of law within two months. The Commissioner was entitled to issue a legally binding decision affirming, varying or annulling the contested decision and require the disclosure of environmental information as appropriate. Some alternative remedies to formal binding decisions included negotiated settlements between a complainant and a public authority or in a few cases suggesting to a complainant that they submit a new focused request when the original

[2] Promote the rule of law at the national and international levels and ensure equal access to justice for all.

[3] Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements.

request had been found to be unreasonable or too general. If the decision of the Commissioner did not satisfy either party and was further appealed, the Commissioner would normally defend it before the High Court, the Court of Appeal or the Supreme Court at his or her own cost, which might be quite high. The existence of two regimes on freedom of information and freedom of environmental information posed another specific challenge concerning where to draw the boundaries and how to avoid disputes regarding jurisdiction and the definition of environmental information.

14. A representative of the Supreme Court of Slovakia highlighted the underlying significance of the eighteenth preambular paragraph of the Convention for its application to a specific case. That paragraph expressed Parties' concern that effective judicial mechanisms should be accessible to the public so that its legitimate interests were protected and the law enforced. He referred to several cases relating to the Convention where access to environmental information had been a determinant factor and efficient judicial review had been important. In particular, the issues raised covered: (a) the linkages between standing and the determination of the public concerned over a wide geographical area as a result of the dissemination of information relating to the construction of a landfill site by a private developer; (b) access to a preliminary emergency report for a nuclear power plan as covered by the scope of environmental information (i.e., information on impact from factors such as radiative emissions); (c) the denial of the possibility to challenge a proposal to adopt a normative legal act at the preparatory stage as an unlawful act of the public authority; and (d) the exhaustion of the time limit for an administrative decision not to be considered relevant for judicial review as the decision itself was the subject of judicial review.

15. In the following discussion, the participants reiterated the importance of sustaining the administrative culture for the successful outcome of the review procedure by independent review bodies, in particular if their decisions were not binding. They also identified the need to explore further the impact of differences in the review procedures concerning the right to information and the right to environmental information in jurisdictions having two access regimes.

16. The Chair then invited participants to learn from the relevant outcomes of the work of the Convention's Task Force on Access to Information and the experiences of several Parties representing different models of access to review procedures in such cases.

17. A representative of the Republic of Moldova reported on the work of the Convention's Task Force on Access to Information. There had been an increase in the number of cases decided by courts and other independent review bodies regarding: (a) the scope of environmental information; (b) access to digital databases; (c) the provision of environmental information by various public and private bodies; and (d) the application of exemptions to the right to access environmental information. Public authorities themselves had played an increasingly mediating role when dealing with public requests to provide sensitive commercial and business information. He also suggested potential interlinkages between the work carried out by the Task Force on Access to Information and the Task Force on Access to Justice regarding the population and use of the jurisprudence database, the compendium of case studies on the use of electronic information tools and the online Aarhus Clearinghouse for Environmental Democracy and the exchange of experience between the two task forces with regard to the public accessibility of information concerning violations of environmental law, environmental inspections, law enforcement, access to judicial and review procedures and decisions of courts and other review bodies.

18. A representative of Germany explored general aspects of and specific challenges to access to justice with regard to the right to environmental information in Germany. In accordance with the Environmental Information Act, any person whose request for environmental information was refused or not properly answered could raise an

administrative appeal (objection) and then if not satisfied could challenge that decision in the administrative courts. Administrative courts could perform a full judicial review. The burden of proof to justify the grounds for refusal was on the public authority that refused access to the requested information. Timeliness was increasingly recognized as an important factor in access to environmental information, especially in the context of imminent threats to the environment and human health or public participation procedures and determined the need for the accelerated protection of information rights. In that regard, interim injunctive relief was an important tool. However, in such cases both a decision to disclose the information in an injunctive proceeding or to refuse the injunctive relief would need to anticipate the result of the principal proceeding. In such cases, administrative courts performed a more exhaustive judicial control and therefore could accept the anticipation of the principal proceeding already in case there was a high degree of probability of the existence of the right to environmental information. Another specific challenge for ensuring the timeliness of access to information could relate to the possible multitude of grounds for the refusal of an information request and the possibility for courts to remit the case to the public authority to decide the matter anew taking the legal view of the court into account (e.g., in case the consultation of third parties was not properly performed). A new decision of the Higher Administrative Court of Baden-Württemberg highlighted that in principle a public authority was required to raise all objections to an information request already within the administrative procedure. That decision along with others indicated an increased judicial emphasis on the timely access to environmental information and a trend towards strengthening the right to such information.

19. A representative of Malta outlined the framework for the review procedure to challenge decisions relating to environmental information requests in accordance with the Freedom of Access to Information on the Environment Regulations (Subsidiary Legislation 549.39). Appeals might be submitted either before the Information and Data Protection Commissioner at no cost against a decision by any public authority, or before the Environmental and Planning Review Tribunal at a small fee against a refusal by the Environment and Resources Authority without the need to prove juridical interest. The Commissioner had the power to issue: (a) an information notice requesting the competent authority to provide information in a specified manner and time; (b) a decision notice indicating the final decision and actions to be taken by the public authority within the stated time limits to implement it; and (c) an enforcement notice indicating actions to be taken by the public authority to ensure compliance with the final decision and particulars of the right to appeal. If the public authority failed to comply with the decision, the Commissioner could issue an administrative fine. The Commissioner's decisions might be appealed before the Information and Data Protection Appeals Tribunal. For its part, the Environmental and Planning Review Tribunal should adhere to the principles of good administrative behaviour (e.g., respect the parties' right to a fair hearing and the principles of natural justice). Finally, decisions of both tribunals were made publicly available online and could be appealed to the Court of Appeal.

20. A representative of Serbia explained the scope of the information of public importance relating to the environment and the strategic and legislative framework guiding its disclosure and access to a review procedure. The Aarhus Centres and bar associations played an important role in promoting the legal protection of the right to environmental information. Refusals of information requests could be appealed to the Commissioner for Access to Public Information and Personal Data Protection free of charge. The Commissioner's decisions were binding, final and enforceable. The decisions of the Commissioner could be further appealed to an administrative court. Court procedures should be conducted without delay and at the lowest possible cost for the parties and other participants in the procedure. Challenges in the area included meeting deadlines for answering information requests; the lack of awareness of the competent public authorities;

provision of access to documents after the expiration of the required time limits; the confidentiality of commercial and industrial information; and a lack of specialization among the judiciary in environmental matters. Further measures could be focused on raising knowledge of environmental information and legislation, promoting close cooperation between the public authorities, the Commissioner and administrative courts and supporting capacity-building for all relevant stakeholders.

21. In the following discussion, the participants discussed the availability of the quantitative data that could support monitoring the effectiveness of access to justice in cases concerning the right to environmental information, addressing possible challenges and evaluating the impact of policy change on the disclosure and dissemination of environmental information.

22. The Chair then invited participants to turn to the consideration of the use of mediation and other mechanisms to challenge refusals to access to information requests.

23. A representative of Switzerland outlined how mediation proceedings on the right to information could promote effective access to justice. In accordance with Swiss law, any person could apply to a public authority for access to an official document containing environmental information. The public authority could justifiably refuse, limit or postpone access to the document if its disclosure could compromise an overriding public or private interest. In such cases, the request for mediation could be filed in writing with the Federal Data Protection and Information Commissioner within 20 days of receipt of the decision from the authority. Generally, the Commissioner acted not only as a mediator in cases of disagreement but also could advise public authorities and members of the public on issues related to the implementation of the Freedom of Information Act and access to official documents. Until 2017, the mediation procedure had usually been conducted mainly in writing with only a few exceptions in complex cases. If agreement could not be reached through the mediation proceedings, the Commissioner would issue a detailed written recommendation. Such a procedure led to a constant work overload for the Commissioner's office and the long duration of proceedings. In 2017, the Commissioner decided to conduct mediation proceedings orally and to issue the written decision limited to the recommendations only. Those changes faced some challenges related to complex cases (e.g., where a third party requested to remain anonymous or one of the parties resided abroad) and the short preparation time (e.g., in cases involving disclosure of a large number of documents). Nevertheless, the mediation proceedings led by the Commissioner provided several benefits, including the independence and impartiality of the mediating body, a free-of-charge procedure to be completed within 30 days from receiving the request for mediation and an increased chance of reaching an agreement between disputing parties, reducing the recourse to judicial review.

24. A representative of the European Investment Bank reported on the lessons learned from cases dealt with by the Bank's two-tiered complaints mechanism regarding access to environmental information. An internal tier placed within an independent Directorate General provided an independent citizen-driven accountability mechanism dealing with project-related and non-project related complaints. The external tier of the mechanism dealt with the complaints to the European Ombudsman. Both tiers had several common features, such as being free of charge, promoting wide accessibility, promoting the right to good administration, ensuring a limited time frame to process complaints and a consultative decision-making process resulting in recommendations. Among benefits and lessons learned so far were a greater awareness of Aarhus-related obligations; the proactive dissemination of environmental information, including through the established public register; the extension of the scope of environmental information to include the relevant social data; and the effectiveness of the two-tier structure. The Aarhus Convention compliance mechanism had also addressed issues concerning the actions and omissions by

the Bank in respect to disclosure of a financing agreement containing environmental information in its findings on communication ACCC/C/2007/21 (ECE/MP.PP/C.1/2009/2/Add.1). The effectiveness of the complaints mechanism relied on the timeliness of the reply, the involvement of third parties, continuous learning opportunities with regard to new products, processes and access to environmental information and ensuring the credibility enhanced by multi-layer accountability.

25. In the following discussion, the participants highlighted that the possibility to address the redress mechanisms should not be limited to the directly affected parties only. Continuous awareness-raising and capacity-building were crucial to promote due diligence and disclosure of environmental information.

26. The Chair stressed the importance of the public trust in justice systems to protect their rights and further invited participants to take stock of NGO experiences and challenges relating to access to justice when the information requests where refused or otherwise not properly dealt with.

27. A representative of EcoForum Kazakhstan emphasized the need for an expeditious review procedure for access to information cases. The first communication to come before the Aarhus Convention Compliance Committee (ACCC/C/2004/1) had involved the refusal of an information request, lengthy judicial review procedures and denial of standing to a Kazakh NGO in a lawsuit on access to environmental information. The communication had alleged breaches by Kazakhstan with its obligations under article 4, paragraphs 1 and 2, and article 9, paragraph 1, of the Convention. Since then, several measures had been taken to address the challenges identified, such as ensuring faster judicial review procedures, a 2017 update of the handbook for judges and regular trainings for judges on the matters related to the Aarhus Convention. At the same time, the Committee's findings on a new communication involving Kazakhstan (ACCC/C/2013/88) had addressed the lack of a sufficient time frame for the public to prepare and participate effectively during environmental decision-making (e.g., the environmental assessment report had been made publicly available only three days before the public hearing) (see ECE/MP.PP/C.1/2017/12). That case highlighted the need for members of the public to have access to an expeditious, free-of-charge and effective review procedure to challenge the flaws in access to information during the public participation procedure and to explore the connection between article 6, paragraph 3, and article 9, paragraph 1, of the Convention with respect to reasonable time frames.

28. A representative of the International Institute for Law and the Environment (Spain) presented lessons learned from two cases challenging administrative silence and refusals of requests to access the baseline reports of coal power plants at the level of provinces and autonomous communities. The cases had resulted in the full or partial disclosure of the requested information in the course of judicial review about two years after the information requests had been submitted. In one case, after the applicant filed the withdrawal from the case the co-defendant had requested the court to restrict the reuse of the information received by the applicant. In both cases, requests for legal aid had been filed but had been granted in one case only. While the practice of granting legal aid to public interest organizations varied across the provinces, it was noted that the lengthy procedures delayed the judicial review. The denial of legal aid and the public authorities' practice of delaying the disclosure of the information requested, relying on the applicant to give up and not have recourse to a review procedure, could constitute an additional barrier to access to information and access to justice and should be discouraged.

29. In the following discussion, a representative of Spain further noted the availability of the quantitative data highlighting that numerous information requests had been mostly satisfied and delays had been recorded only in a few very specific cases.

30. The participants noted an overall improvement in the Convention's implementation in the area. They also raised issues concerning court fees and access to legal aid in information cases. They highlighted the need to ensure that courts had access to the disputed information and called for existing barriers to justice to be removed and for improved access to justice regardless the number of cases in the area.

31. The Chair thanked the participants for the informative discussion, called for the continuation of the information exchange focusing on the comprehensive overviews of the existing systems and suggested carrying out a survey on the matter. He invited the participants to support the proposal on the survey, and to provide their comments both during and after the meeting on a draft questionnaire (AC/TF.AJ-11/Inf.4) that had been submitted for their consideration . The questionnaire would be revised by the secretariat in consultation with the Chair in the light of the comments received and distributed to selected institutions specializing in information cases in a representative number of Parties from different subregions. In addition, representatives of the judiciary, judicial training institutions, other review bodies, NGOs and stakeholders could contribute their input in relation to issues addressed through the questionnaire. Those interested in taking part in the survey should complete and return the questionnaire for processing before 1 October 2018.

32. In the succeeding discussion, further comments on the proposal included to publish the responses to the questionnaire unless otherwise requested owing to concerns about retaliation; to clarify question 5 regarding the length of the procedure; and to include a general question regarding available case law demonstrating innovative approaches and main barriers in the area.

33. Following the discussion, the Task Force:

(a) Recalled that effective access to justice in cases on the right to environmental information contributed to the successful implementation of other relevant provisions of the Convention, and also contributed to the achievement of targets 16.3 and 16.10 of Sustainable Development Goal 16 and underpinned other relevant Sustainable Development Goals and targets;

(b) Encouraged Parties and stakeholders to take the necessary measures to address existing challenges and to further promote effective access to justice in cases on the right to environmental information;

(c) Decided to continue the exchange of information, experiences, challenges and good practices with regard to access to justice in cases on the right to environmental information and to undertake a survey to facilitate the collection of additional information;

(d) Took note of the draft questionnaire and agreed to provide final comments by 20 March 2018;

(e) Requested the secretariat in consultation with the Chair to update as necessary and circulate the questionnaire to collect the required information and invited the Chair to report at the twelfth meeting of the Task Force on the results of the survey.

III. Stocktaking of recent and upcoming developments

34. In a discussion on recent and upcoming developments, participants shared their experience with issues related to: (a) standing and non-discrimination in the context of access to justice; (b) the scope of review; and (c) adequate and effective remedies.

35. Opening the discussion, the Chair invited participants to share key recent developments with regard to legislation, policy and case law relating to the implementation of article 9 of the Convention, noting that there had been several recent important

judgments on environmental matters from the Court of Justice of the European Union and from national courts of several Parties. In that connection, he thanked the contributing experts for providing their summaries for the jurisprudence database available through the Aarhus Clearinghouse[4] and the Convention's website.[5]

36. A representative of the European Commission presented the Notice on Access to Justice in Environmental Matters.[6] The Notice had been released as an interpretative communication of the European Commission to bring together the substantial 38 cases of the Court of Justice of the European Union and draw careful inferences from them. Its provisions could be carefully considered in the light of several important judgments that had been issued by the court afterwards. The scope of the Notice was limited to access to justice in relation to decisions, acts and omissions by public authorities of the member States of relevance to the requirements of article 9, paragraphs 2 and 3, of the Convention. It did not address environmental litigation between private parties or judicial review of acts of the European Union institutions (other than noting at paragraph 154 the role of validity references under article 267 of the Treaty on the Functioning of the European Union). In essence, access to justice provisions were reflected in the primary law (in particular, article 19, paragraph 1, of the Treaty on European Union and article 47 of the European Union Charter of Fundamental Rights) and secondary environmental law of the European Union. The speaker stressed the mutual influence of the Aarhus Convention and the European Union law over the past two decades. Effective judicial protection should be ensured for both procedural rights within the public participation procedure (e.g., the *Kraaijeveld* case[7]) and substantive rights such as the right to health, property rights or fishing rights (e.g., the *Janecek* case,[8] the *Stichting Natuur en Milieu* case[9] and the *Folk* case[10]). He also explored the relationship between the status of environmental NGOs as a "party to the procedure" and the standing of environmental NGOs to further challenge relevant decisions, acts and omissions of public authorities (see, e.g., *Lesoochranárske zoskupenie I*[11] and *II*[12] and the *Protect* case[13]). The scope of judicial review should cover

[4] Available from https://aarhusclearinghouse.unece.org/jurisprudence .

[5] Available from http://www.unece.org/env/pp/tfaj/jurisprudenceplatform.html .

[6] See Commission Notice on access to justice in environmental matters, 2017 O.J. (C 275), pp. 2–39, Available from http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2017.275.01.0001.01.ENG .

[7] Case C-72/95, *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v. Gedeputeerde Staten van Zuid-Holland*, E.C.R. 1996 I-5403. Available from http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1524737521274&uri=CELEX:61995CJ0072 .

[8] Case C-237/07, *Dieter Janecek v Freistaat Bayern*, 2008 O.J. (C236), pp. 3-4. Available from http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1524751382094&uri=CELEX:62007CA0237 .

[9] Joined Cases C-165 to C-167/09. *Stichting Natuur en Milieu and Others v College van Gedeputeerde Staten van Groningen* (C-165/09) and *College van Gedeputeerde Staten van Zuid-Holland* (C-166/09 and C-167/09), E.C.R. 2011 I-4599. Available from http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1524754215601&uri=CELEX:62009CJ0165 .

[10] Case C-529/15, *Gert Folk*, 2017 O. J. (C 249), pp. 4. Available from http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1524755271816&uri=CELEX:62015CA0529 .

[11] Case C-240/09, *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*, 2011 O.J. (C 130), p. 4. Available from http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1524820923077&uri=CELEX:62009CA0240 .

[12] Case C-243/15, *Lesoochranárske zoskupenie VLK v. Obvodný úrad Trenčín*, 2016 O.J. (C 6), pp. 16. Available from http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1524821344493&uri=CELEX:62015CA0243 .

[13] Case C-664/15, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v. Bezirkshauptmannschaft Gmünd*, 2017 O.J. (C 72), p. 4. Available from http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1524756*309045&uri=CELEX:62015CA0664 .

both the procedural and substantive legality of decisions, acts and omissions, regardless of whether they lay within the scope of paragraphs 2 or 3 of article 9 of the Convention.

37. A representative of Justice and Environment, a European environmental law network, presented recent developments regarding access to justice in several countries, focusing on various challenges and case law updates concerning: (a) Austria (standing of environmental NGOs); (b) Bulgaria (one-level court review for strategic cases); (c) Czechia (limited possibilities for NGOs to participate in decision-making on projects not subject to environmental impact assessment); (d) Estonia (scope of review and admissibility of environmental actions); (e) Germany (limited scope of the right to challenge violations of environmental law); (f) Hungary (lack of administrative appeal and one-level court review in most cases); and (g) Spain (access to legal aid). In Slovakia, the adoption of the new Code of Administrative Judicial Review promoted positive changes, namely: enabling: (a) the interested public to submit a claim if the public interest in the field of environmental protection was impaired; (b) an action to be brought before the court against administrative decisions, measures and generally binding acts or inaction of an administrative body; and (c) the application of interim relief when there existed a risk that the contested administrative decision, if executed during the court proceedings, could cause serious harm to the environment.

38. In the further discussion, participants expressed their views on the criteria for standing of members of the public in environmental cases that could satisfy the requirements under article 9, paragraphs 2 and 3, of the Aarhus Convention, noting that the jurisprudence was still evolving and that no clear borderline in the requirements had yet been established.

39. A representative of the Office of the United Nations High Commissioner for Human Rights drew attention to two recent reports by the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment on framework principles on human rights and the environment (A/HRC/37/59) and the linkages between children's rights and the environment (A/HRC/37/58). Both reports would be submitted to the Human Rights Council at its thirty-seventh session (Geneva, 26 February–23 March 2018). She further noted that no group could be considered more vulnerable to environmental harm than children (persons under the age of 18), who made up 30 per cent of the world's population. Both the Convention on the Rights of the Child and the Aarhus Convention guaranteed children's rights to environmental education, access to information, participation in decision-making and access to remedies. In the context of environmental harm, children might face additional barriers to access to justice, especially because of children's dependent's status and a lack of information and assessments on the long-term effects of the exposure of children to harmful activities. States should give particular attention to ensuring that there were effective, child-sensitive procedures available to children and their representatives. Those should include the provision of child-friendly information, advice and advocacy, including support for self-advocacy, and access to independent complaints procedures and the courts with necessary legal and other assistance. Further steps to enable effective access to justice through submitting collective suits (or "class actions") on behalf of children should also be encouraged and could be addressed through the work of the Task Force, as relevant.

40. In the further discussion, participants also stressed the importance of promoting environmental awareness in legal education for children and youth to enable them to exercise their rights under the Aarhus Convention to address environmental challenges and support the work of environmental NGOs.

41. A representative of the Netherlands reported on further developments during the inception phase of the Dutch Whistle-blowers Authority and identified lessons learned from the challenges encountered in that process that could be considered in implementing similar

initiatives to protect whistle-blowers. Furthermore, the speaker outlined different possibilities for NGOs to submit environmental claims under public law and civil law in the Netherlands. In particular, class actions in environmental matters could be brought by NGOs under article 3:305a of the Dutch Civil Code without direct representation. The modification of that article to allow NGOs to claim financial damage was still pending finalization. In recent years, courts had decided on the admissibility and merits of several cases brought by NGOs against the State with regard to emissions levels and air quality. The case law had reaffirmed that such cases were only admissible if the parties had sufficient interest and if no effective remedy in administrative law existed.

42. A representative of the Supreme Administrative Court of Czechia highlighted the relevant principles of administrative justice with regard to environmental cases. The purpose of administrative justice was to protect individual rights, including the right to a favourable environment, and not the legality of acts, decisions or omissions of the public authorities. Administrative courts being bound by the plaintiffs' claims had only cassation powers to revoke or declare the nullity of the contested administrative decision. Enshrined in the Charter of Fundamental Rights and Freedoms as a part of the Czech constitutional order, the right to a favourable environment could be claimed only within the confines of the laws implementing those provisions in procedural and substantive meaning. The case law of the Constitutional Court of Czechia and further amendments to the law on environmental impact assessment clarified that that right could be vested in natural persons, associations as "the public concerned" or other associations or municipalities as representatives of natural persons. The plaintiff should prove that his or her right had been negatively affected by the unlawful administrative decision. That provided that the impact on the environment should be unlawful and there had to be a sufficient territorial or other relationship of the plaintiff to the part or the component of the environment concerned. Several factors such as a lack of timeliness, injunctive relief and the possibility to extend the scope of review beyond the claims submitted could undermine the effectiveness of judicial review in environmental matters and should be further addressed.

43. A representative of Georgia presented national developments with regard to public access to judicial and administrative review procedures to challenge the legality of decisions, acts or omissions subject to the provisions of article 6 of the Aarhus Convention. Those developments had been triggered by the recent adoption and entry into force of a new Environmental Assessment Code. The Code defined activities subject to environmental impact assessment procedure by default or in case of a positive screening decision and set out in detail the public participation procedure. In accordance with the Code, members of the public without distinction could challenge any decision violating the right to public participation or national laws relating to the environment. The challenge should be submitted to a superior administrative body, without the need to exhaust the preliminary review procedure prior to having recourse to a judicial review procedure. The decision by a superior administrative body might be further appealed in court.

44. A representative of the Aarhus Centre in Vlore, Albania, shared experience in raising the awareness of communities, interest groups and other members of the public of their rights to access environmental information and participate in decision-making regarding the projects that might affect community life. Such work had empowered members of the public to actively exercise their rights guaranteed by the Convention, for example with regard to the decision to construct a new hydropower plant in Pocem, which decision had been successfully challenged in the administrative court. Nevertheless, access to justice for communities, especially in rural areas, could be further improved and supported by widening access to injunctive relief, providing expertise and clear information on access to review procedures, changing the burden of proof, promoting the specialization of judges and prosecutors in environmental matters and providing access to free legal aid.

45. A representative of "Environment Links UK" provided an update on access to justice matters in the United Kingdom on the basis of the written statement submitted prior to the meeting. She expressed concern regarding ongoing reforms to judicial review and the cost regime in England and Wales. At the same time, Northern Ireland had made a number of positive amendments to their costs regime for environmental cases and the Scottish government had amended its judicial review regime in respect of costs and standing. The public consultations carried out by the Scottish government also revealed support for the establishment of an environmental court or tribunal, but no further action had been taken by the government owing to the lack of a clear consensus with regard to the types of cases that could be brought before such a court or tribunal. She also pointed out challenges related to the intensity of the judicial review in the United Kingdom caused by the applicability of the Wednesbury unreasonableness test,[14] especially in planning cases, and drew attention to communication ACCC/C/2017/156 pending admissibility before the Convention's Compliance Committee.[15]

46. A representative of Oekobuero (Austria) highlighted that the rulings of the Court of Justice of the European Union in the *Protect* case could have a further positive effect on the admissibility of cases on water issues and the standing of environmental NGOs in that regard. Nevertheless, there had been negative as well as positive developments since that decision had been issued and it remained unclear whether the *Protect* ruling would be applied in cases that did not invoke the application of European Union law or that concerned the standing of a party that had not participated in the decision-making procedure. In addition, any consultations on possible options to improve the review procedures relating to the environment should be carried out not only with the participation of the business community but also environmental NGOs.

47. Addressing opportunities for judicial review in Belarus, a representative of the NGO Ecohome drew attention to the increased number of cases related to access to environmental information, while noting at the same time that upcoming legislative developments could limit the possibility for members of the public to claim the termination of activities violating environmental law.

48. A representative of EcoForum Kazakhstan highlighted the issue of the intimidation of members of the public, in particular calling for flaws in the public participation procedures for the decision-making in relation to the construction of a ski resort in the Kok Zhailau area of the Ile-Alatau National Park, which were the subject of communication ACCC/C/2013/88, to be addressed.[16] In February 2018, several members of the public had launched a campaign advocating effective public participation in decision-making on that matter, and a constructive meeting between the members of the public and the developers had subsequently taken place. Nevertheless, shortly after the meeting a defamatory article against the opponents of the project had been released in the media. Despite that article, the affected community demonstrated support for the environmental defenders. Community support was more effective than governmental support in such a case. The latter could focus rather on the protection of whistle-blowers than environmental defenders.

49. Following the discussion, the Task Force:

(a) Took note of the recent developments, challenges and lessons learned related to access to justice in environmental matters presented by the speakers;

[14] *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223.

[15] More information is available from http://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/envppcccom/acccc2017156-united-kingdom.html .

[16] The Compliance Committee subsequently adopted its findings and recommendations with regard to this case on 19 June 2017 (ECE/MP.PP/C.1/2017/12).

(b) Expressed appreciation to Parties and stakeholders for providing information on recent developments and case law to the Aarhus Clearinghouse and the jurisprudence database;

(c) Encouraged Parties and stakeholders to develop additional measures and promote national dialogues as appropriate to address challenges with regard to standing, the scope of review, timeliness, access to effective remedies, financial barriers and access to legal aid, and to continue information exchange on those matters;

(d) Reiterated the importance of strengthening efforts to promote access to information and to provide assistance and guidance to the public in seeking access to justice in environmental matters.

IV. Tools to promote effective access to justice

50. In a discussion on tools to promote effective access to justice, participants shared experiences and lessons learned from initiatives related to: (a) promoting capacity-building, raising awareness and cooperation; (b) monitoring and evaluating the effectiveness of review procedures; and (c) promoting e-justice initiatives and other practical measures to ensure effective public access to review procedures.

51. The Chair suggested starting the session by taking stock of the recent developments in the area of judicial cooperation.

52. A representative of the Constitutional Court of Belgium and President of the European Union Forum of Judges for the Environment explained the objectives, membership and the recent activities of the Forum. In particular, the 2017 annual conference of the Forum had focused on climate change adjudication and had taken stock of the country reports on the matter. A growing number of cases linked to climate change had been filed in constitutional, administrative or civil courts across various jurisdictions (e.g., Belgium, the Netherlands and Norway) in recent years. The future activities of the Forum would include the 2018 annual conference, with a focus on specialization in environmental adjudication, and participation in the work of the Global Judicial Institute on the Environment and the European Union Environmental Compliance and Governance Forum.

53. Participating by video link, a representative of the Supreme Court of Norway and member of the Steering Committee of the International Union for Conservation of Nature World Commission on Environmental Law presented recent developments with regard to international cooperation among the judiciary on environmental law. Highlighting the current environmental challenges and the complexity of the interests at stake, she underscored that judges dealing with environmental matters should have sufficient competence and up-to-date knowledge and understanding of environmental law. That could be supported through initiatives aimed at enhancing cooperation among the judiciary at the regional and global levels. At the global level such cooperation was promoted by the International Union for Conservation of Nature, the World Commission on Environmental Law, the Global Judicial Institute on the Environment and the Ecolex platform, which the International Union for Conservation of Nature jointly operated with the Food and Agriculture Organization of the United Nations and UNEP. The Global Judicial Institute had recently been established to support the role of judges, courts and tribunals in applying and enforcing environmental laws. The Institute was open for two categories of membership: judges and judicial institutions. Its work was at an early stage with regard to securing funding and establishing a permanent secretariat, but the Institute had already been responsible for meetings and training sessions. Further cooperation between the Institute and the Task Force should be encouraged.

54. A representative of UNEP outlined several areas of work related to promoting access to justice in environmental matters. UNEP would continue promoting the further integration of human rights concerns in environmental decision-making and its support to the mandate of the Special Rapporteur on human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. Other activities included the launch of the Environmental Rights Initiative; support for the Global Judicial Institute on the Environment and the Asia Pacific Judicial Colloquium on Climate Change, held under the auspices of the Lahore High Court in Pakistan in February 2018; preparations for the launch of the first-ever "Global Environmental Rule of Law Report"; and the implementation of the InforMEA Initiative.[17] Further cooperation with the Task Force within the framework of the InforMEA Initiative could include joint training activities for judicial stakeholders and the development of common semantic and technical standards and formats for the exchange of case law and jurisprudence to support enhanced exchange among judicial networks, ultimately underpinning the monitoring of progress towards global internally agreed goals, including Sustainable Development Goal 16, with statistical data on environment-related case law.

55. A representative of the Office of the United Nations High Commissioner for Human Rights informed participants about the Accountability and Remedy Project[18] launched in 2013 to enable more consistent implementation of the United Nations Guiding Principles on Business and Human Rights (HR/PUB/11/04)[19] in the area of access to remedy. The first part of the project had focused on judicial remedy and a report of the part provided guidance on how States could review their domestic legal regimes to ensure access to effective remedy. A second part had focused on State-based non-judicial mechanisms and their role in providing access to remedy for business-related human rights abuse. Research so far had shown that such mechanisms were highly relevant when it came to addressing violations of environmental rights; there were several State-based non-judicial mechanisms that could address environmental disputes, such as environmental ombudsmen, environmental tribunals, specialist mediation or regulatory bodies active in environmental matters. The final report would be presented to the Human Rights Council in June 2018 and would provide recommendations to States on how they could enhance the effectiveness of State-based non-judicial mechanisms in providing access to effective remedy for victims of business-related human rights abuse, including with regard to environmental matters.

56. A representative of the Regional Environmental Centre for Central and Eastern Europe outlined the main capacity-building activities related to access to justice. Within the framework of the project "Better Access to Justice in South-Eastern Europe", funded by Germany, several capacity-building activities had been implemented in Albania, Bosnia and Herzegovina, Kosovo,[20] the former Yugoslav Republic of Macedonia, Montenegro and Serbia. The activities focused on promoting cooperation at the subregional level between NGOs, the judiciary and environmental institutions responsible for access to justice matters to reduce the major gaps in the implementation of the access to justice pillar of the Convention. Within the framework of the project "Building Bridges between Regions", funded by Italy, the Regional Environmental Centre had actively supported the drafting of a regional instrument on environmental rights in Latin America and the Caribbean, including the relevant provisions on access to justice. The Centre remained committed to further

[17] Available from https://www.informea.org/ .

[18] More information on the project is available from http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx .

[19] Ibid.

[20] References to Kosovo shall be understood to be in the context of Security Council resolution 1244 (1999).

exploring the possibilities for building the capacities of stakeholders, and to providing continued support to national and regional initiatives to advance the Aarhus Convention's implementation.

57. A representative of Justice and Environment presented a project being carried out in 2017–2020 jointly by Justice and Environment and the NGO ClientEarth with the support of the European Union LIFE financial instrument. The geographical scope included Austria, Estonia, France, Germany, Hungary, Poland, Slovakia and Spain. The current phase of the project focused on the preparation of eight initial national workshops bringing together the judiciary, ministries of environment, ministries of justice, public authorities, NGOs, academia and individual experts to explore the best ways to address the needs in access to justice in environmental matters. Other project activities included: 48 trainings for the judiciary and other stakeholders in the eight target countries involving 1,000 people; the project website with analysis of recent developments in access to justice; a handbook and eight national toolkits designed as educational material; a digital online platform with an "ask a lawyer" function; a closing conference in Brussels; and a monthly newsletter about relevant developments. The progress of the project and its outcomes could be further promoted within the work of the Task Force.

58. The Chair recalled that decision VI/3 of the Meeting of the Parties to the Convention encouraged Parties to undertake further considerable efforts to improve the effectiveness of public access to justice in environmental matters, inter alia, by increasing public accessibility to the relevant information as required by the Convention and implementing e-justice initiatives. He invited participants to share their experience in that regard.

59. A representative of Kazakhstan informed participants about the work of the body responsible for the Convention's implementation in Kazakhstan to monitor legislation with regard to access to justice in environmental matters. The activities undertaken included an analysis to improve the legislation, monitoring of public hearings, preparation of information materials, maintaining a register of case law relevant to the environment and provision of environmental information online. The legislative changes adopted in 2016 had introduced the right of environmental NGOs to bring an *actio popularis* challenge in environmental matters and had abolished court fees for bringing environmental claims not related to property matters. To improve the legislation and eliminate gaps that had been identified, in 2017 further changes had been initiated to the Environmental Code of Kazakhstan and the rules on public hearings. Among the changes, the minutes of public hearings now had to contain information on access to review procedures by members of the public to challenge the decision adopted. A register of court decisions on the Aarhus Convention was maintained by submitting requests to the regional and similar courts to provide relevant judgments and it provided a useful tool to analyse the case law on specific issues such as public access to information, public participation in environmental decision-making or compensation of environmental damage.

60. A representative of the Supreme Court of Kazakhstan provided additional information regarding the application of the 2016 Normative Resolution to promote uniform understanding and application of environmental law in adjudicating civil cases across the court system; approaches to judicial education on environmental law; opportunities for establishing administrative justice; the introduction of the requirement of exhaustion of administrative review procedures in environmental matters prior to recourse to judicial review procedures; and the implementation of e-justice initiatives, such as access to digital copies of the judicial proceedings upon request by parties to the proceeding and online tracking of a timeline of judicial actions regarding specific cases.

61. A representative of the Supreme Court of Kyrgyzstan highlighted the importance of the national e-justice initiative in improving the timeliness and effectiveness of access to

justice by the members of the public in environmental matters and called for support to be provided to further similar initiatives across the region.

62. A representative of Belarus reiterated that public access to legal information played a crucial role in facilitating access to justice in environmental matters. To support the dissemination of such information, the National Center of Legal Information had created and maintained digital databases containing information on legislation, administrative procedures, case law, document templates and established legal practices; supported information retrieval systems online and as desktop applications; and had developed a network of centres providing access to legal information in the country and abroad. While a unified approach to providing public access to court decisions had yet to be established, the Centre implemented measures to further develop a publicly accessible special database of court decisions. Such decisions should be accompanied with a brief summary but without access to personal data. To facilitate access to comprehensive information, the Center ensured the integration of that database into the information retrieval system together with the information on legislation, its application, commentaries and other relevant legal information, inter alia, on environmental matters. The Center also supported the development of information sites in public libraries, educational institutions and law enforcement institutions that facilitated access to such information by vulnerable groups, especially at the local level. Such an approach promoted the implementation of article 9, paragraph 5, of the Convention with regard to access to information.

63. A representative of the Aarhus Centre in Vlore, Albania, reported on the establishment of the Aarhus Centres network in South-Eastern Europe in 2015 to support the implementation of the Convention and called for further support for their work in raising awareness and assisting members of the public to seek justice in environmental matters at the local level.

64. Following the discussion, the Task Force:

(a) Welcomed the capacity-building and awareness-raising initiatives presented by speakers;

(b) Encouraged Parties and stakeholders to address capacity-building and awareness-raising needs in access to justice in environmental matters at the local level and with regard to vulnerable groups;

(c) Called for the promotion of further capacity-building and the strengthening of the specialization of judges, prosecutors, attorneys, public interest lawyers and other legal professionals in environmental cases;

(d) Welcomed the initiatives of Parties and stakeholders aimed at monitoring the effectiveness of access to justice in environmental matters and collecting the relevant quantitative data on the implementation of article 9 of the Convention and the environmental dimension of Sustainable Development Goal target 16.3, and called on Parties and partner organizations to undertake, support and promote similar initiatives;

(e) Encouraged the wide dissemination and use of the analytical studies and material collected under the auspices of the Task Force, the Aarhus Clearinghouse and the jurisprudence database for capacity-building activities promoting effective access to justice.

V. Prioritization of the work for the intersessional period 2018–2021

65. The Chair noted that the Task Force would have two more meetings during the intersessional period — in 2019 and in 2021 — and would contribute to the preparation of the thematic session at the meeting of the Working Group of the Parties in 2020.

66. The Chair also recalled that in 2019 Sustainable Development Goal 16 and its target 16.3 would undergo a review at the Regional Forum on Sustainable Development for the ECE region and in the framework of the high-level political forum on sustainable development, noting that the outcomes of the Task Force's work could contribute to the discussion at those forums.

67. The Chair suggested the next meeting in 2019 look at access to justice in cases challenging acts or omissions that contravened permit requirements or laws relating to the environment, in accordance with the specific request of the Meeting of the Parties as set out in the Task Force's renewed mandate (ECE/MP.PP/2017/2/Add.1, decision VI/3, para. 14 (a) (ii)). As the topic was broad and highlighted the connection between paragraphs 2 and 3 of article 9 of the Convention, the discussion could focus on access to justice by the members of the public in cases relating to air quality based on several scenarios. The 2019 meeting could be organized back to back with a judicial forum or colloquium in cooperation with partner organizations to promote access to justice in environmental matters for achieving sustainable development.

68. In the follow up discussion, the participants:

(a) Generally supported the Chair's suggestion for a thematic focus for the 2019 meeting, while noting that some cases relating to air quality before the courts could be still pending;

(b) Highlighted that other possible topics to be addressed by the Task Force could include access to justice by the members of the public in cases relating to fracking activities or environmental impact assessment procedures;

(c) Expressed concern about a trend towards derogation from effective and wide access to justice in environmental matters and urged the Task Force to continue addressing systemic approaches to improve the protection of environmental defenders, whistle-blowers and other persons exercising their rights in conformity with the provisions of the Convention.

69. Following the discussion, the Task Force:

(a) Agreed that the Task Force meeting in 2019 would focus on access to justice in cases challenging acts or omissions that contravened permit requirements or laws relating to the environment, focusing on cases relating to air quality (e.g., permits for industrial installations and plans and projects concerning infrastructure, land use and air quality management);

(b) Agreed to follow up on the outcomes of the current meeting with regard to access to justice in information cases;

(c) Encouraged the further population, dissemination and use of the analytical studies[21] and material collected under auspices of the Task Force, the Aarhus Clearinghouse

[21] Available from http://www.unece.org/env/pp/tfaj/analytical_studies.html .

and the jurisprudence database for further exchange of information, experiences, challenges and good practices.

VI. Approval of key outcomes and closing of the meeting

70. The Task Force agreed the key outcomes of the meeting (AC/TF.AJ-11/Inf.5) and requested the secretariat, in consultation with the Chair, to finalize the report and to incorporate the outcomes therein. The Chair thanked the speakers, the participants, the secretariat and the interpreters and closed the meeting.